October TERM 1970

NO. 300

BRIEFS NOT PRINTED

SUPREME COURT OF THE UNITED STATES

October Term, 1970

ODOM v. UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 300. Decided November 9, 1970

PER CURIAM.

A writ of certiorari was granted in this case on June 22, 1970, 399 U. S. 904, limited to the question of the retroactivity of our decision in *Pearce* v. *North Carolina*, 395 U. S. 711. Since the granting of the writ there has come to the attention of the Court an order of Judge McRae of the United States District Court for the Middle District of Florida, dated July 1, 1970, denying a motion of petitioner Odom to set aside his second sentence as illegally imposed under *Pearce, supra*. The order makes it clear that the greater severity of the second sentence was based on conduct on the part of the petitioner occurring after the time of the original sentencing proceeding, and that the new information was specifically referred to at resentencing. Since it is now apparent that this case does not present the issue of the retroactivity of *Pearce* v. *North Carolina, supra*, the writ is dismissed as improvidently granted.

MR. JUSTICE DOUGLAS.

The question is whether *North Carolina* v. *Pearce*, 395 U. S. 711, should be retroactive. In that case we said ". . . the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal." *Id.*, at 726. The information now reported to us by the District Court was never made a part of the record. Hence an issue of retroactivity of *Pearce* is present and I would decide the case on the merits.